

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

BETTY J. WILLIAMS, AS SURVIVING NATURAL MOTHER
OF SHANSAN ROMAINE GANT, DECEASED,
Plaintiff/Appellee,

v.

ELTORNA GANT,
Appellant.

No. 2 CA-CV 2019-0054
Filed October 15, 2019

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pinal County
No. S1100CV201500694
The Honorable Daniel A. Washburn, Judge

AFFIRMED

COUNSEL

Cole & Leal PA, Casa Grande
By Joseph M. Leal III
Counsel for Plaintiff/Appellee

Eltorna Gant, Tucson
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this statutory wrongful death action, Eltona Gant appeals from the trial court's order that he is entitled to zero dollars of the settlement proceeds.¹ Gant argues that Betty Williams, the named plaintiff in the action, and her attorney breached their fiduciary duties to him by failing to obtain his consent before reaching a settlement. He also challenges the evidence supporting the court's order. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The relevant facts are undisputed. Gant and Williams are the biological parents of S.G. In April 2002, Gant was convicted of attempted first-degree murder of Williams and first-degree murder of Williams's mother. Gant was sentenced to consecutive prison terms, the longer of which was life imprisonment.

¶3 In April 2013, S.G. died when the vehicle he was driving crashed head-on with a concrete-mixing truck. Two years later, Williams filed this wrongful death action against Bruce Taylor, the driver of the truck; his employers; and the owners of the truck (collectively, "Taylor"). Williams filed the action on behalf of S.G.'s statutory beneficiaries, also naming his three minor children. The case proceeded to trial in November

¹Although Gant was not a named party in the wrongful death action, we nonetheless conclude that he has standing to appeal the trial court's order. Gant's rights were litigated below, and the court's order denied him any right to the settlement proceeds. See *Ariz. R. Civ. App. P. 1(d)* (party aggrieved by judgment may appeal); *Kerr v. Killian*, 197 Ariz. 213, ¶ 10 (App. 2000) (party is aggrieved if judgment denies that party some personal or property right); cf. *In re Kory L.*, 194 Ariz. 215, ¶ 3 (App. 1999) (in delinquency case, juvenile's mother who was not party to action could appeal order that she pay restitution).

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2018, but the parties agreed to settle the lawsuit for \$200,000 before jury deliberations began.

¶4 Shortly thereafter, Williams and Taylor filed a joint motion for an order to show cause (OSC) for Gant “to confirm or disclaim an interest in the settlement proceeds.” The motion explained that Williams had intended to ask the probate court, as part of its approval of the settlement in the conservatorship proceedings for S.G.’s children, “to determine the interest, if any, of [Gant] in the settlement given that [he had], to date, refused to execute a waiver,” but that court determined “it did not have the authority to resolve third-party claims impacting the minors’ estate.” Accordingly, Williams and Taylor sought an OSC hearing in the wrongful death action “as a means of resolving” Gant’s interests.

¶5 Gant filed an “Objection to Approval of Claim Settlement,” asserting that he was a statutory beneficiary and asking the trial court to consider his “right to claim [twelve] percent.” He subsequently filed a “Motion to Confirm Interest in the Settlement Proceeds,” again asking the court “to consider [his] right to claim interest at [twelve percent].”

¶6 After an OSC hearing later that month, at which Williams, Gant, one of S.G.’s children, and the mother of S.G.’s youngest child testified, the trial court noted that “no one, including . . . Gant, is contesting the fact that he has had notice of the original claim and was aware of these proceedings.” The court further found that Gant was a statutory beneficiary but “did not have a relationship with [S.G.] prior to his death.” Specifically, the court observed that Gant had tried to kill S.G.’s mother; that S.G. had expressed “anger” toward and “blam[ed]” Gant for trying to kill his mother and killing his grandmother; that S.G. had “never mentioned or talked about [Gant], nor wanted a relationship with him”; and that S.G. had not visited Gant in prison. Because Gant “did not have a meaningful relationship with [S.G.],” the court ordered Gant’s “portion [of] the settlement that was reached at the time of trial [to be] zero dollars.” This appeal followed.² We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

² The trial court’s minute entry order lacked finality language pursuant to Rule 54(c), Ariz. R. Civ. P. However, the court later entered a final judgment pursuant to Rule 54(c), indicating that its signed minute entry had resolved “all outstanding claims and issues.” See Ariz. R. Civ.

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Discussion

¶7 As a preliminary matter, we note that Gant has failed to meaningfully comply with Rule 13(a), Ariz. R. Civ. App. P. His opening brief does not contain a clear statement of the issues presented for our review or appropriate argument as to those issues with citations to the parts of the record relied upon. *See* Ariz. R. Civ. App. P. 13(a)(6), (7). Despite Gant’s pro se status, he is held to the same standards as an attorney. *See Kelly v. NationsBanc Mortg. Corp.*, 199 Ariz. 284, ¶ 16 (App. 2000). Gant’s lack of compliance with Rule 13(a) could constitute a waiver of the issues on appeal. *See Sholes v. Fernando*, 228 Ariz. 455, ¶ 16 (App. 2011). However, in our discretion, and because we prefer to resolve cases on their merits, *Adams v. Valley Nat’l Bank of Ariz.*, 139 Ariz. 340, 342 (App. 1984), we attempt to address Gant’s arguments.

Fiduciary Duties

¶8 Gant contends that Williams and her attorney violated their fiduciary duties to him as a statutory beneficiary by “settl[ing] without [his] consent and reach[ing] an agreement [on] distribution while excluding [him].” Generally, we defer to a trial court’s factual findings unless they are clearly erroneous. *Davis v. Zlatos*, 211 Ariz. 519, ¶ 18 (App. 2005). Factual findings are not considered clearly erroneous if substantial evidence supports them. *Id.* However, we review questions of law de novo. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, ¶ 9 (App. 2007).

¶9 A wrongful death action may be brought when the “death of a person is caused by wrongful act” and “the act . . . would, if death had not ensued, have entitled the party injured to maintain an action to recover damages.” A.R.S. § 12-611. The action must “be brought by and in the name of the surviving husband or wife, child, parent or guardian, or personal representative of the deceased person for and on behalf of the

App. P. 9(c) (notice of appeal filed before entry of appealable judgment treated as filed after entry of such judgment).

Gant’s notice of appeal also failed to indicate which judgment he was appealing. *See* Ariz. R. Civ. App. P. 8(c). However, as Williams points out, Gant’s notice of appeal referred to having asked the trial court to award him twelve percent of the settlement. The notice of appeal thus conveyed sufficient notice to Williams which order Gant was challenging and did not cause her any prejudice. *See Hill v. City of Phx.*, 193 Ariz. 570, ¶ 10 (1999).

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surviving husband or wife, children or parents, or if none of these survive, on behalf of the decedent's estate." A.R.S. § 12-612(A).

¶10 Because § 12-612(A) "contemplates that claims by all statutory beneficiaries be consolidated in a single action," the statutory beneficiary who becomes the named plaintiff "represents all other beneficiaries who have a 'legal right . . . to be compensated for their loss resulting from the victim's death.'" *Wilmot v. Wilmot*, 203 Ariz. 565, ¶¶ 11-12 (2002) (emphasis omitted) (quoting *Summerfield v. Superior Court*, 144 Ariz. 467, 476 (1985)). The named plaintiff thus owes fiduciary duties to the other beneficiaries, "both in conducting and settling the action and making distribution of proceeds to each of the other beneficiaries at the conclusion." *Id.* ¶ 13.

¶11 Gant relies on *Wilmot* to suggest that Williams and her attorney had a duty to obtain his consent before agreeing to settle the lawsuit. But Gant is neither challenging the amount of the settlement nor the fact that settlement was reached in lieu of trial. As we understand it, his argument is directed at the duty to obtain his consent to the settlement distribution among the beneficiaries. However, based on the record before us, Gant did not raise this issue below.

¶12 "Matters not presented to the trial court cannot for the first time be raised on appeal." *Brown Wholesale Elec. Co. v. Safeco Ins. Co. of Am.*, 135 Ariz. 154, 158 (App. 1982); see also *Odom v. Farmers Ins. Co. of Ariz.*, 216 Ariz. 530, ¶ 18 (App. 2007). The rationale underlying this rule is that "a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994).

¶13 In his "Motion to Confirm Interest in the Settlement Proceeds," Gant cited *Wilmot*, seeming to suggest that Williams and her attorney owed him fiduciary duties because he was a statutory beneficiary. But Gant did not argue that they had breached their duties by failing to obtain his consent to the settlement agreement or to the distribution thereof. Rather, Gant indicated that he had previously sent an email to Williams's attorney "to approve the settlement" and asked that the trial court award him a twelve-percent interest. Accordingly, it appears that neither the court nor the opposing parties were afforded an opportunity to address the consent issue below. See *Trantor*, 179 Ariz. at 300. It is therefore waived on appeal. See *Odom*, 216 Ariz. 530, ¶ 18; *Brown Wholesale*, 135 Ariz. at 158.

¶14 Even assuming the argument were not waived, however, Gant's reliance on *Wilmot* is misplaced. In *Wilmot*, after Milton Wilmot

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died, his surviving wife brought a wrongful death action. 203 Ariz. 565, ¶ 1. Milton had six adult children from a prior marriage, and “there were indications . . . that the children wished to assert their claims and were proceeding, albeit slowly, to appear [in the action] through independent counsel.” *Id.* ¶¶ 4-6, 31. The wife nonetheless “settled the case without obtaining the consent of the children.” *Id.* ¶ 1. Our supreme court vacated the order confirming the settlement, reasoning, “Very simply, when, in a representative capacity, one asserts a claim or brings an action that affects claims of others—and in the present case, could preclude them—any settlement made by the one conducting the matter for the benefit of others must be agreed to by the others.” *Id.* ¶¶ 18, 35. The court additionally observed, “Just as the plaintiff must conduct the action with full disclosure to the beneficiaries and obtain consent for settlement from all, even if such consent is difficult to obtain, so too must the lawyer for the statutory plaintiff act for all known beneficiaries,” unless the beneficiaries have expressed a desire not to participate or to waive any claim. *Id.* ¶ 21. The court thus concluded that it was the fiduciary duty of the wife and her attorney “to obtain the children’s consent to the settlement before any binding acceptance.” *Id.* ¶ 32.

¶15 This case is factually distinguishable from *Wilmot* because, unlike the children in that case, Gant did not clearly indicate that he wished to participate in the action and assert a claim for damages until after the parties had filed their OSC motion—over two years after receiving notice the action had been filed. In a letter to Williams’s attorney, Gant admitted he had “been aware of the lawsuit since the documents were filed in the Pinal County Superior Court.” But based on the record before us, we agree with the trial court that Gant “never filed anything in this case prior to January 02, 2019,” when he filed his “Objection to Approval of Claim Settlement.”

¶16 This case is also factually distinguishable from *Wilmot* because, again unlike the children in that case, Gant expressly approved the settlement agreement. As stated above, Gant apparently sent an email to Williams’s attorney “to approve the settlement.” This is in contrast to the children in *Wilmot* who opposed the settlement agreement, filing both an opposition to the motion to confirm the settlement and a motion to set aside the trial court’s ruling enforcing the settlement. *Id.* ¶¶ 2, 7.

¶17 Although *Wilmot* suggests that the named plaintiff in a statutory wrongful death action and her attorney must obtain the other beneficiaries’ consent before entering into a settlement agreement, our supreme court did not adopt a bright-line rule with respect to how or when

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that consent must occur. *See id.* ¶¶ 18, 21, 32-34. Instead, the court determined that the fiduciary duties must be evaluated on a case-by-case basis and generally “require[] that the statutory plaintiff and her lawyer act to protect the rights and interests of all beneficiaries who seek or may seek to assert their claims.” *Id.* ¶¶ 33-34.

¶18 Here, the record shows that Williams’s attorney contacted Gant in August 2017, informing him of the case and asking if he would sign a waiver of claim. Gant indicated that he would not sign the waiver, and Williams’s attorney suggested Gant consider retaining his own lawyer “if it [was his] intent to make a claim for damages.” Another attorney recommended that Gant waive his claim. Williams’s attorney continued to keep Gant informed of the status of the case, listing Gant as a witness on the pretrial statement and as a beneficiary on the proposed verdict form. Gant was also aware of the trial date but did not appear—either telephonically or through counsel. Accordingly, we cannot say Williams or her attorney breached their duties. *See Flying Diamond Airpark, LLC*, 215 Ariz. 44, ¶ 9; *Davis*, 211 Ariz. 519, ¶ 18.

Sufficiency of the Evidence

¶19 Gant also seems to suggest that the trial court’s order is not supported by the record. He contends that he is “entitled to a larger percentage than [the twelve percent he] asked for” because he financially supported Williams and their sons during their “entire [twenty-four-year] relationship” and that he “was involved in their daily lives,” even calling them on the telephone from prison.

¶20 In a statutory wrongful death action, damages are awarded as is “fair and just with reference to the injury resulting from the death to the surviving parties who may be entitled to recover.” A.R.S. § 12-613. Apportionment of damages is “based on individual pecuniary loss,” *Quinonez v. Andersen*, 144 Ariz. 193, 196 (App. 1984), and a factor to consider is the relationship between the decedent and the beneficiary, *Burnham v. Miller*, 193 Ariz. 312, ¶ 5 (App. 1998). An award of zero damages is permissible. *Walsh v. Advanced Cardiac Specialists Chartered*, 229 Ariz. 193, ¶ 5 (2012).

¶21 In determining that Gant was entitled to zero dollars of the settlement proceeds, the trial court considered Gant’s claim in the context of his relationship with S.G. *Cf. Wilmot*, 203 Ariz. 565, ¶ 23 (children denied right to have determination of damages based on individual claims). In essence, Gant asks that we reweigh the evidence and reevaluate the

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credibility of the witnesses presented. That is not our function. *See Brown v. U.S. Fid. & Guar. Co.*, 194 Ariz. 85, ¶ 36 (App. 1998). Rather, we review the record for substantial evidence supporting the court's factual findings. *See Davis*, 211 Ariz. 519, ¶ 18. However, we cannot do so here because Gant has failed to provide us with a transcript from the OSC hearing. *See Ariz. R. Civ. App. P. 11(c)(1)* (appellant's duty to order transcripts necessary for proper consideration of issues on appeal); *see also Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995). Accordingly, we must presume the missing transcript supports the court's findings and conclusions. *See Johnson v. Elson*, 192 Ariz. 486, ¶ 11 (App. 1998).

Disposition

¶22 For the foregoing reasons, we affirm.